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No. 96-1756

In The

Supreme Court of the United States

October Term, 1996

WALTER McMILLIAN,

Petitioner,

v.

THOMAS TATE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Thomas Tate respectfully requests that the Petition for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit be *denied*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

There are no constitutional or statutory provisions, other than 28 U.S.C. § 1291 quoted in the Petition, at pp. 2-3, which are directly involved in the issue presented.

STATEMENT OF THE CASE

Upon review of the Petitioner's "Statement of the Case", Respondent sets out below three misstatements of fact which have a bearing on the question of what issues would properly be before the Court if certiorari were granted:

1. The Petitioner subtly mischaracterizes the holding of the Eleventh Circuit with respect to its remand of the *Brady* issue. To read the Petitioner's account of the opinion below, one would think the Eleventh Circuit reviewed the district court's denial of qualified immunity with respect to the *Brady* claims based on the same reasoning that it reviewed the district court's misreading of the record on the Karen Kelly issue. *See* Pet. 7-8. That is not the case. Instead of undertaking a factual review on

the *Brady* issue, the Eleventh Circuit merely remanded the issue to the district court with instructions to reformulate the qualified immunity inquiry.

> The district court held that several pieces of withheld evidence were clearly exculpatory [footnote omitted]. *However, the district court did not ask whether every reasonable official in the position of Tate, Ikner, and Benson would understand that withholding those particular pieces of evidence would undermine confidence in the outcome of McMillian's trial.* The court viewed the evidence with the benefit of hindsight, knowing what evidence actually was presented at trial, and agreed with the Alabama Court of Criminal Appeals that the evidence withheld was material. But Tate, Ikner, and Benson did not have the benefit of knowing exactly how the totality of the evidence would play out at trial. *It is from their perspective that the district court should have analyzed whether the evidence was material, and we remand for the district court to do so.*

Pet. App. 30a. (emphasis added). In other words, the Eleventh Circuit was not questioning the district court's finding that the evidence withheld was material *at some point*; it only called upon the district court to pinpoint McMillian's claim, unclear from the Complaint, as to when Tate allegedly withheld *Brady* evidence and then to answer the question as to whether a reasonable officer would have known the evidence was material at that point. The Eleventh Circuit clarified its remand instructions in footnote twenty-one of the opinion.

> We are unable to determine from the complaint and record exactly when it is that McMillian alleges that Tate, Ikner, and Benson should have

> realized that the withheld evidence was material. It is not clear whether McMillian's claim is that Tate, Ikner, and Benson should have realized the evidence's materiality when they acquired it, sometime later but before trial, at trial as the evidence unfolded, or after trial. *On remand, the district court will have to determine McMillian's precise claim before deciding whether a reasonable official would have known that the suppressed evidence was material.*

Pet. App. 30a (emphasis added). Nowhere in these passages did the Eleventh Circuit make its own factual finding or even question the district court's finding; it merely called for the district court to sharpen its focus and reanalyze qualified immunity on the *Brady* claims.

2. The Petitioner fails to put Respondent's notice of interlocutory appeal in the proper context.[1] McMillian states that "[i]n his appeal, Tate sought not only review of the District Court's determinations of the legal questions of whether the law was clearly established with respect to certain constitutional norms, but also review of the District Court's conclusions that certain factual questions existed sufficient to preclude summary judgment." Pet. 5. This statement is inaccurate. Tate did not request the exercise of pendent appellate jurisdiction over *factual* questions as alleged by Petitioner; Tate asked that the Court consider "three other related questions of law." Pet.

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[1] The notice of interlocutory appeal was filed on February 14, 1995, prior to the release of this Court's rulings in *Swint v. Chambers County Commission*, 514 U.S. 35 (1995), *Johnson v. Jones*, 115 S. Ct. 2151 (1995), and *Behrens v. Pelletier*, 116 S. Ct. 834 (1996).

App. 61a. Even the third question relating to Karen Kelly did not call upon the Eleventh Circuit to review the district court's factual findings. *See* Pet. App. 62a. More importantly, Tate's request for the Court to exercise pendent appellate jurisdiction over the "merits" question does not necessarily lead to the conclusion that no proper qualified immunity question existed. On appeal, Tate, in fact, framed and argued his challenge to the district court's holding on the *Brady* claims, as a qualified immunity question:

> "IV. THE DISTRICT COURT ERRED IN DENYING SHERIFF TATE QUALIFIED IMMUNITY WITH RESPECT TO McMILLIAN'S CLAIMS THAT TATE "INTIMIDATED" POTENTIAL WITNESS KAREN KELLY, *WHOM THE DEFENSE NEVER INTENDED ON CALLING TO TESTIFY.*"[2]

It is within the context of this qualified immunity argument that Tate pointed out to the Court, in a footnote, the district court's misreading of the record. The Eleventh Circuit, upon interlocutory appeal and while ruling on the qualified immunity issue, picked up on this footnote, examined the record for itself and confirmed that the district court misread Karen Kelly's testimony.

3. Petitioner contends that he challenged the *substance* of the Eleventh Circuit's conclusion that the district court simply misread the record as to whether Kelly could have provided exculpatory testimony for him. Pet. 7 n.2. Yet, he clearly never has made such a challenge and

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[2] The full text of Tate's qualified immunity argument on the Karen Kelly issue is set out in the appendix to this brief.

still refuses to do so. The district court made the erroneous finding of fact with respect to Karen Kelly in its January 17, 1995 Order. Pet. App. 145a ("Given the fact that Kelly initially implicated Myers, not McMillian for the Morrison murder, Defendants knew she was a potential defense witness.").[3] Two weeks after the district court's Order was entered, Tate filed a motion to alter or amend the judgment pointing out the district court's misreading of the record. McMillian filed no opposition to Tate's challenge. Again, Tate, in the appellant's brief to the Eleventh Circuit, pointed out the district court's error with respect to Kelly; and again, McMillian failed to dispute this challenge substantively, arguing only that the issue was not properly before the appellate court.[4] Clearly, McMillian's objection was more jurisdictional or procedural in nature and not substantive as McMillian contends in his petition. Pet. 7 n.2. Now, McMillian has filed a Petition for a Writ of Certiorari with this Court and continues his failure to cite *any* portion of the record to support the district court's reading.

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[3] The district court failed to cite the record to support this finding although it had frequently cited the record in support of other findings. *See i.e.*, Pet. App. 84a-88a, 109a-125a, 141a-142a.

[4] The phraseology used by McMillian in his Eleventh Circuit brief is quite telling: "There is evidence, *said the District Court*, that Tate – [knew] Kelly could be a witness for McMillian." (emphasis added).

REASONS NOT TO GRANT THE WRIT

I. THE OPINION OF THE ELEVENTH CIRCUIT BELOW DOES NOT PRESENT AN IMPORTANT QUESTION WHICH SHOULD BE SETTLED BY THIS COURT.

McMillian contends that a writ of certiorari is appropriate because the Eleventh Circuit, in an interlocutory appeal of qualified immunity, revisited the district court's factual findings, a procedure which finds no basis in this Court's interpretation of 28 U.S.C. § 1291. McMillian specifically objects to two aspects of the opinion below, one of which remands an issue of qualified immunity and another which corrects the district court's misreading of the record. The former was more of a traditional qualified immunity legal analysis and does not implicate this Court's holdings in *Swint*, *Johnson*, or *Behrens*. The latter, although clearly a factual determination, can be justified either as part of the reviewing court's "core" qualified immunity analysis or as an exercise of pendent appellate jurisdiction. Under either theory, the Eleventh Circuit was justified in addressing the district court's misreading of the record. This type of corrective action – straightening out an obvious misstatement by the district court – does not present a sufficiently important issue for the granting of certiorari.

A. The Eleventh Circuit's remand to the district court on the *Brady* claims is clearly a routine qualified immunity "legal" determination and presents no controversy for this Court to resolve.

As explained more fully in Respondent's "Statement of the Case", Petitioner tries to create a jurisdictional issue out of the Eleventh Circuit's remand of the *Brady* claims where none really exists. The Eleventh Circuit's remand of the qualified immunity question on the *Brady* claim does nothing to implicate either *Johnson, Behrens,* or *Swint*. The court merely instructed the district court to reconsider its denial of qualified immunity while focusing on when the allegedly withheld evidence would have appeared material to a reasonable officer. *See* Pet. App. 30a. Nowhere did the Eleventh Circuit make its own factual finding or rule upon the sufficiency of the evidence. The court only clarified what the proper qualified immunity inquiry should be.

B. The Eleventh Circuit's decision to correct the district court's obvious and undisputed misreading of the record is implicitly authorized by *Johnson, Behrens* and *Swint*.

On pages nine through eleven of the Petition, McMillian contends that *Johnson v. Jones, Swint v. Chambers County Commission,* and *Behrens v. Pelletier* do not definitely settle the issue of whether a reviewing court, upon interlocutory appeal, may review factual findings of the district court in the midst of an otherwise proper qualified immunity appeal. Strictly speaking, the Petitioner is correct. Nothing in the *holding* of these cases

provides a basis to dispositively answer the question presented by Petitioner.

However, there is certainly sufficient dictum in all three cases to indicate that such jurisdiction indeed exists. First, the Court, if it wanted to eliminate all pendent appellate jurisdiction, could have used *Swint* as the vehicle to communicate that message; yet, it chose not to do so. "We need not definitely or preemptively settle here whether or when it may be proper for a court of appeals with jurisdiction over one ruling to review, conjunctively, related rulings that are not themselves independently appealable." *Swint*, 514 U.S. at ___, 115 S. Ct. at 1212. The Court acknowledged earlier in the opinion that it "ha[d] not universally required courts of appeals to confine review to the precise decision independently subject to appeal." *Id.* at 511 (*citing Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 755-757 (1986); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 172-173 (1974); *Chicago, R.I. and P.R. Co. v. Stude*, 346 U.S. 547, 578 (1954); *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 287 (1940)). This Court also noted, with apparent approval, the court of appeals' endorsement of the doctrine of a pendent appellate jurisdiction. *Swint*, 115 S. Ct. at 1209 n. 2.

The dictum in *Johnson v. Jones* is even more explicit in its discussion of factual review and pendent appellate jurisdiction. In part II, C, of the opinion, the Court addressed the concern that creative defendants would be able to circumvent *Johnson*'s holding by using a frivolous legal issue as a means to bring their primary challenge, factual in nature, before the reviewing court. *Johnson*, 115 S. Ct. at 2159. Interestingly, the Court never discounts

that possibility. Instead, the Court leaves such problems for the courts of appeal to resolve in their discretion. *Id.* ("[I]t does not automatically follow that the court of appeals would also have reviewed the here more important determination that there was a genuine issue of fact as to whether Petitioners participated in (or were present at) a beating.") In other words, the courts of appeal might very well choose not to exercise jurisdiction over factual issues if it determines that the legal arguments are insubstantial. The Court then went on to discuss pendent appellate jurisdiction, assuming for the sake of argument that it sometimes might be appropriately exercised, and citing with approval circuit opinions which allow such jurisdiction. *Id.* The Court later acknowledged that its rule "occasionally requires a detailed evidence-based review of the record." *Id.* One scenario where such a factual review might be necessary is where the district court fails to set out the facts it relied upon to deny qualified immunity. *Id.*[5]

Behrens repeats *Johnson*'s finding that the reviewing court could, under some circumstances, review the record and make its own factual findings. *Behrens*, 116 S. Ct. at 842. *Behrens* principally stands for the proposition that *Johnson* barred interlocutory appeals based *solely* on evidence insufficiency.

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[5] The instant case provides a scenario not too remote from the one discussed in *Johnson*. In the instant case, the district court set out the facts assumed to be true but merely misread the record on one critical fact, that is, whether Karen Kelly could provide any favorable testimony to McMillian.

C. The issue of whether the courts of appeal may correct obvious misstatements of the district court as it reviews other legal matters does not present an important federal question.

Even assuming for the sake of argument, that the Eleventh Circuit is nearing the limits of its appellate jurisdiction under 28 U.S.C. § 1291, this case is not the proper vehicle to revisit pendent appellate jurisdiction. The courts of appeal should always retain some remedial power to straighten out clearly erroneous findings of the district court in appeals which are otherwise properly before them.

D. This Court has, on two occasions, declined the opportunity to review the Eleventh Circuit's interpretation of the scope of interlocutory appeals after *Johnson* and *Behrens*

If this Court were concerned about the Eleventh Circuit's so-called "rather expansive view of its own jurisdiction on interlocutory appeals", *see* Pet. 10, it could have granted certiorari to review the holding of the court in *Dolihite v. Maughon By and Through Videon*, 74 F.3d 1027 (11th Cir. 1996). It is in that case that the Eleventh Circuit spoke extensively to the effect of *Johnson v. Jones* and *Swint v. Chambers County* on its jurisdiction in the context of an interlocutory appeal of qualified immunity. In *Dolihite*, the Eleventh Circuit articulated its view that when the defendant public official's "primary argument" challenges the district court's legal conclusions on qualified immunity, the appellate court can analyze not only the legal issues involved but also "identif[y] precisely the

relevant actions of the appellant and the relevant information possessed by [the appellant]". *Id.* In *Dolihite*, the appellee challenged this view of jurisdiction by filing a petition for writ of certiorari and presented the following question: "May the Eleventh Circuit Court of Appeals in contravention of this Court's decision in *Johnson v. Jones*, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995), take jurisdiction over non-final decisions of the district court in qualified immunity cases; and can the appellate court evoke pendent appellate jurisdiction and substitute its own evidentiary determinations on the sufficiency of the evidence?" *See* Brief of Petitioner, No. 96-183 in *Dolihite v. King*. This Court denied certiorari. *Dolihite v. King*, ___ U.S. ___, 117 S. Ct. 185 (1996).

This Court again had the opportunity to review the Eleventh Circuit's perspective on appellate review of qualified immunity when the Plaintiff sought a writ of certiorari in *Johnson v. Clifton*, 74 F.3d 1087 (1996). In *Johnson v. Clifton*, the Eleventh Circuit again articulated its view of jurisdiction after *Johnson v. Jones* and concluded that it could review factual findings of the district court on any one of three bases: where the district court failed to identify the facts it relied upon to deny qualified immunity; as part of the "core of qualified immunity analysis" which requires a review of the defendant's conduct; and through pendent appellate jurisdiction. *Id.* at 1091. The Eleventh Circuit would not review the district court's factual findings "if there is any evidence in the record to support the District Court ruling that there was a genuine issue of material fact as to whether the official actually engaged in the conduct that violated clearly

established law." *Id.*[6] The plaintiff in *Johnson v. Clifton* sought review by certiorari and presented the following issue statement: "Whether this Court's decision, *Johnson v. Jones*, 115 S. Ct. 2151 (1995), permits immediate appellate review of a District Court's order denying a public official's motion for summary judgment based on qualified immunity, where the trial court finds "genuine issues of material fact" on the merits of a Plaintiff's constitutional tort claim?" *See* Brief of Petitioner, No. 95-1743 in *Hill v. Clifton*. However, the Court again denied certiorari. *Hill v. Clifton*, ___ U.S. ___, 117 S. Ct. 51 (1996).

II. THERE IS NO CONFLICT AMONG THE CIRCUITS IN TERMS OF THE MORE NARROW ISSUE OF WHETHER A REVIEWING CIRCUIT COURT CAN CORRECT OBVIOUS AND UNDISPUTED MISREADINGS OF THE RECORD WHEN THE CASE IS OTHERWISE PROPERLY BEFORE IT.

The Petitioner has failed to establish a conflict among the circuits as to whether a reviewing court may clear up an obvious and undisputed misreading of the record by the district court in the midst of an otherwise legitimate appeal. Petitioner contends that there is a conflict among the circuits *generally* as to whether circuit courts of appeal may, under *Johnson v. Jones*'s definition of appellate jurisdiction, review disputed factual findings of the district court so long as a legal issue concerning qualified immunity is presented. Pet. 12-13. That appears to be the case

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[6] Of course, in the instant case, there was *no* evidence supporting the district court's finding on the Karen Kelly issue.

although the conflict may not be as one-sided as it appears. For instance, the Petitioner counts the Second Circuit as one which would not allow factual review. Pet. 12 (citing *Rivera v. Senkowski*, 62 F.3d 80, 86 (2d Cir. 1995)). However, a more recent case appears to contradict the holding of *Rivera*. *See Blue v. Koren*, 72 F.3d 1075, 1084 n.6 (2d Cir. 1995) (construing *Johnson v. Jones* to allow the exercise of pendent appellate jurisdiction to review factual findings in district court).

Petitioner also fails to account for the possibility that many of the circuits – which, under *Johnson v. Jones*, find no jurisdiction to review factual aspects of a district court's order denying qualified immunity – recognize pendent appellate jurisdiction and could examine the same matter under that theory. *See Carver v. Foerster*, 102 F.3d 96, 101 n.4. (3d Cir. 1996); *Brennan v. Township of Northville*, 78 F.3d 1152, 1157-58 (6th Cir. 1976); *Woolfolk v. Smith*, 81 F.3d 741, 743 (8th Cir. 1996); *see also Gilda Marx, Inc. v. Wildwood Exercise, Inc.*, 85 F.3d 675, 678 (D.C. Cir. 1996). This is significant because the Eleventh Circuit did not specify whether it was reviewing the district court's factual finding as part of the "core qualified immunity analysis" or under the doctrine of pendent appellate jurisdiction. Cf. *Dolihite*, 74 F.3d at 1034 n.3. Certiorari should not be granted in the instant case merely to eliminate factual review under *Johnson v. Jones* if the Eleventh Circuit's ruling can be upheld under a pendent appellate theory.

Significantly, none of the cases cited by Petitioner addresses a case like the instant one where the court of appeals, in reviewing a traditional legal qualified immunity argument, discovers an obvious and undisputed misreading of the record by the district court and simply corrects that misreading. This presents a far narrower

issue than whether the reviewing court could re-weigh evidence or re-assess the credibility of witnesses on a *controverted* point of fact. Presumably, no circuit court of appeals would exclude jurisdiction to remedy a simple oversight on the part of the district court if that oversight is discovered in the process of reviewing otherwise appealable questions.

CONCLUSION

Based upon the foregoing, Respondent Thomas Tate respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

No. 95-6123

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

WALTER McMILLIAN,

Plaintiff-Appellee,

vs.

W.E. JOHNSON, et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

BRIEF OF APPELLANT THOMAS TATE

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* * *

V. THE DISTRICT COURT ERRED IN DENYING SHERIFF TATE QUALIFIED IMMUNITY WITH RESPECT TO McMILLIAN'S CLAIM THAT TATE "INTIMIDATED" POTENTIAL WITNESS KAREN KELLY, *WHOM THE DEFENSE NEVER INTENDED ON CALLING TO TESTIFY.*

The district court below denied Tate summary judgment on Count III with respect to Karen Kelly "[b]ecause the court [found] that a *reasonable defense witness* might understand the statement allegedly made by Tate (that Kelly was going to prison because of McMillian) as a threat of criminal prosecution in retaliation for testimony *in favor of* the defendant. . . . " (R7-127-89). The denial of summary judgment was error for two reasons.

First, the court improperly employed an objective standard of analysis ("reasonable defense witness") rather than a subjective one: whether *Karen Kelly* was in fact intimidated or threatened by Tate's alleged statements. In the evidentiary materials submitted *by the Plaintiff*, Kelly stated, by deposition, that "nobody threatened [her];" that she was "not bother[ed]" by the alleged statements; and that, in her estimation, all Tate and the other defendants wanted her to do was to tell the truth and get her life straightened out. (R3-94-Exhibit 25, Kelly depo. pp. 92, 104, 246). If the question is whether Karen Kelly was improperly influenced; and, Kelly testifies affirmatively that nothing Tate did influenced her in the least; the mere possibility that another person – however reasonable – could be negatively influenced by the same treatment is simply not sufficient to overcome summary judgment on this count.

Second, and perhaps more important, McMillian has neither pled nor proven that Kelly was an *actual* "defense witness" or that she had any testimony *favorable to McMillian* which she could have given but for Tate's alleged coercion. Significantly, Karen Kelly was involved in this case only because she came forward with *inculpatory* testimony: McMillian had told her about killing the girl at Jackson's Cleaners in Monroeville and that Myers drove the truck. (R2-82-Exhibit 2, Tate Aff., p. 11). Kelly's statement, along with the corroborating testimony of Bill Hooks, Jr.,[7] provided Tate with what he believed to be sufficient probable cause to arrest both Myers and McMillian for the Morrison murder. (R2-82-Tate Aff., p. 12). Kelly, who was never called upon by either side to testify at McMillian's trial, could not have testified in a manner favorable to McMillian – or at least nothing in the record establishes such an ability.[8] Furthermore, neither

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[7] Hooks testified that he had seen someone he knew as "Johnny Dozier," whom he now knows to be Walter "Johnny D" McMillian, walking quickly out of Jackson's Cleaners on the day of the Morrison murder. (R2-82-Hooks Aff.).

[8] On page 89 of the Order, the district court reasons that "Given the fact that Kelly initially implicated Myers, not McMillian, for the Morrison Murder, Defendants knew she was a potential defense witness." However, counsel for Defendant Tate can find no support for this statement in the record. It appears that Kelly implicated both McMillian and Myers from the beginning. (R2-82-Exhibit 2). The pages referenced by the district court of Simon Benson's deposition describing Kelly's implication of Myers are references to the *Pittman* murder. (R3-94-Exhibit 20, Benson Depo., pp. 71-74, 82, 86 of Benson Depo.). The fact that Kelly implicated Myers in the Pittman murder would not have been admissible, much less exculpatory, in the McMillian's trial for the Morrison murder. In her

in the Complaint nor in the Opposition to summary judgment, does McMillian contend that Kelly had favorable testimony to offer. McMillian's defense attorney, Bruce Boynton, found Kelly "basically . . . incoherent . . . without substantial enough detail that we would have put her on the witness stand." (R7-130-Boynton Depo. p. 52). Furthermore, Boynton worried that Kelly's appearance at trial only highlighted the interracial nature of her relationship with McMillian before the jury therefore creating another "risk factor." (Id. at pp. 54-55). Finally, Boynton concluded that Kelly, "a sort of rambling person," was not credible and would not have been a good witness to put on the stand. (*Id.* at pp. 115, 128). McMillian's other attorney, J.L. Chestnut, confirms Boynton's estimation of Kelly. Although Kelly was available to testify, Chestnut considered her "crazy" and refused to call her as a witness. (R7-130-Chestnut Depo., pp. 55-56).

McMillian's first and only mention of Karen Kelly in relation to Count III is on page 69 of the Opposition brief where he devotes all of one footnote sentence to Kelly – still without identifying favorable testimony that Kelly could have given. McMillian emphasizes Kelly only in Count IV where he belabors what an *unreliable* witness Kelly is. (R3-94-pp. 82-83).

In effect, the Court's order has found Tate potentially liable for coercing an objectively reasonable *non-witness* – someone whom the defense considered to be unreliable and did not want on the stand anyway – *not* to testify.

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deposition, Kelly does testify that she had never seen McMillian with a gun but, again, such testimony would hardly have been admissible, relevant evidence. (R3-94-Exhibit 25, p. 92).

None of the cases cited by the Court on pages 74-78 of the Order which discuss "defense witnesses" go so far as that. Certainly, there is not sufficient evidence to create a genuine issue of fact that any constitutional right of McMillian's was violated with respect to Kelly, much less a clearly established constitutional violation sufficient to overcome Tate's qualified immunity.

"Intimidation" of a criminal defense witness, who has absolutely no relevant exculpatory testimony to offer and whom the criminal defense attorneys never intended on calling anyway, is not a clearly established violation of the criminal defendants' constitutional rights for purposes of a 42 U.S.C. § 1983 cause of action. There certainly is authority, as cited in the district court's order, (R7-127-pp. 74-78), that postulate, in the context of a criminal conviction challenge, that intimidation of defense witnesses "without regard to prejudice" justifies reversal of the conviction. *See Demps v. Wainright*, 805 F.2d 1426, 1433 (11th Cir. 1986), *cert. denied*, 484 U.S. 873 (1987).

The phrase "without regard to prejudice" should not be so literally construed that it would encompass a case where the allegedly intimidated witness had absolutely no exculpatory evidence whatsoever to offer and would not even have been called to testify at trial. Such a scenario is quite different from allowing law enforcement to keep a citizen imprisoned merely by arguing "harmless error" – that the testimony most likely would not have changed the outcome of the case. Presumably all the cases cited by the district court involved witnesses who were believed by the defense to have had favorable testimony to offer. *See Webb v. Texas*, 409 U.S. 95 (1972) (holding that trial judge's remarks to "sole defense witness" caused the

witness to refuse to testify and therefore violated the accused's due process rights); *United States v. Hammond*, 598 F.2d 1008, 1012 (5th Cir. 1979) (noting that the plaintiff alleged that "important defense witnesses" were intimidated); *United States v. Henricksen*, 564 F.2d 197, 198 (5th Cir. 1977) (describing witness who refused to testify as one "whose testimony would have tended to exonerate [the accused]").

This Court should not "cross the great divide" and allow such a stringent standard formulated in the criminal context to apply in a § 1983 action for damages. It is one thing to err on the side of caution and reverse a conviction where intimidation is alleged "without regard to prejudice" yet quite another to hold an individual liable for damages under § 1983 for the same alleged conduct.[9] *See McKinney v. Pate*, 20 F.3d 1550, 1556 n. 7 (11th Cir. 1994) (*en banc*), *cert. denied*, 115 S. Ct. 898 (1995). To the knowledge of Appellant's counsel, only one case has applied this principle in the context of § 1983 and found a public official individually liable. *See Heller v. Plave*, 743 F. Supp. 1553, 1563-65 (S.D. Fla. 1990). However, even in that case, the court required some tangible effect on the witness or the trial. *Id.* at 1565 (reasoning that "[i]nterference occurs when a *defense witness* may

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[9] An example of where a less stringent standard is applied in the context of a § 1983 action than would be in a criminal case is the search and seizure context. Mere lack of probable cause to support a search or arrest will justify the exclusion of evidence or release of the criminal suspect. However, the searching or arresting officer could be held liable only if he lacked "arguable probable cause." *See Von Stein v. Brescher*, 904 F.2d 572, 579 (11th Cir. 1990).

reasonably interpret a government official's comments as threats of prosecution *and when the witness changes her testimony in response thereto*") (emphasis added).

It was not clearly established in 1987 that so-called intimidation of what is essentially a non-witness supported a § 1983 action for damages.

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